

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

25607

FILE: B-209260.2**DATE:** June 28, 1983**MATTER OF:** Calma Company**DIGEST:**

1. Sufficiency of formal written justification for use of a descriptive literature clause is a matter of form and does not constitute a basis for sustaining a protest where the circumstances necessary for including such a clause are present. Further, issue of whether those circumstances are such that a descriptive literature clause may be properly included must be protested prior to bid opening date.
2. Protest alleging that requirement for descriptive literature contained in solicitation was defective because it did not meet the specificity requirements of the Defense Acquisition Regulation (DAR) will not be considered since the protest concerns an alleged defect in the solicitation and it should have been filed prior to bid opening.
3. Protester's bid for a computer system was properly found to be nonresponsive where it failed to show which of two models of a component identified in its bid was to be offered where at least one of the models did not conform to specification requirements. Further, protester's bid contained no literature describing another component and its literature showed that the bidder was proposing only four hardware communication links where the solicitation required eight.
4. Where IFB provision requiring a "light pen" to control the board work on a digitizer was imprecise in that the term was used in its generic rather than its literal sense, since the protester's bid was properly found nonresponsive on other basis, it was not prejudiced by this vague specification.

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5. Protester's contentions that the proposed awardee failed to supply descriptive literature for a number of items in its bid, and that the low responsive bidder failed to include a maintenance contract in its bid as required by the specifications, are without merit where the record contains literature on each item, the agency determined that the literature was adequate to determine the responsiveness of the proposed awardee's bid, and the specifications did not require that an actual maintenance contract be submitted with the bid.
6. Where a statement in the proposed awardee's descriptive literature indicates that it intends to supply graphic processors with 500,000 bytes of memory as required by the IFB, this statement clarifies the bidder's pre-printed descriptive literature which indicates that the processors have only 440,000 bytes of memory.

Calma Company protests the proposed award of a contract to provide four computer aided design/computer aided manufacturing (CAD/CAM) systems to Applicon, Schlumberger under invitation for bids (IFB) No. DAAG49-82-B-0130 issued by the Tooele Army Depot, Tooele Utah. Calma contends that the Army improperly rejected its bid as nonresponsive but that Applicon's bid is nonresponsive. For the reasons that follow, we deny the protest in part and dismiss it in part.

The solicitation sought bids on four CAD/CAM systems consisting of specifically identified quantities of hardware and software items as well as training, site preparation, maintenance and optional equipment. The IFB contained a clause directing bidders to furnish descriptive literature as a part of their bids to establish the details of the bidders' products "as to the Interactive Graphic System Specification Requirement", and specified that failure to provide the literature would require rejection of the bid.

At bid opening, Calma was the low bidder. An evaluation team appointed to review the bidders' descriptive literature found that Calma had failed to provide descriptive literature for some of the items it proposed to furnish and that its literature indicated it intended to furnish certain items different from those required by the specifications. Consequently, Calma's bid was rejected as nonresponsive.

Calma contends that the agency failed to provide a proper justification for the inclusion of the descriptive literature clause in the solicitation as required by Defense Acquisition Regulation (DAR) § 2-202.5(c).— In this regard, the protester contends that the justification prepared by the agency consists merely of conclusory statements to the effect that the agency needed the literature so that it could determine whether the proposed systems met the specifications. Further, Calma argues that even if there was sufficient justification for including the descriptive literature requirement, the actual clause was defective because it did not clearly establish the nature and extent of the literature required.

We do not believe that Calma has raised a substantive issue regarding the sufficiency of the agency's formal justification for including the descriptive literature clause in the solicitation. The sufficiency of the formal justification is merely a matter of form and does not constitute a basis for sustaining a protest as long as the circumstances necessary for including such a clause are present. See Starlight Components, Inc., B-194367, December 5, 1979, 79-2 CPD 390, concerning the related issue of the sufficiency of a formal determination and findings needed to justify negotiation.

The issue of whether the circumstances surrounding a particular procurement are such that the agency may properly include a descriptive literature requirement is one which under our Bid Protest Procedures must be protested prior to the bid opening date. ~~4 C.F.R. §~~ 21.2(b)(1) (1983). Calma's protest was filed after bid opening. The protester was aware when it received the solicitation that it included a descriptive literature clause. It was incumbent on the protester during the

period between the receipt of the solicitation and the bid opening date to pursue whatever information it needed to raise an objection to the existence of the clause and then file its protest. See National Steel and Shipbuilding Company; Atkinson Marine Corporation; Triple "A" South, B-202399, .2, .3, December 15, 1981, 81-2 CPD 471. Thus, we dismiss Calma's argument that the clause was improperly included in the solicitation.

Similarly, we dismiss as untimely Calma's argument regarding the sufficiency of the descriptive literature clause included in the solicitation. As indicated above, our procedures require that alleged improprieties in a solicitation which are apparent prior to bid opening must be filed before the bid opening date. 4 C.F.R. § 21.2(b) (1). Calma argues that it could not have known of the improprieties in the descriptive literature clause until it became aware after bid opening of the agency's unreasonable reading of the clause as requiring literature on virtually every minor part of the system.

We disagree with Calma as to that portion of its argument in which that firm urges that the clause is defective for lack of specificity and should not be enforced. This argument is untimely as the protester had access to the language of the clause during the solicitation period and failed to complain until after bid opening. See Slack Associates, Inc., B-195305, July 28, 1980, 80-2 CPD 69. We will, however, consider Calma's argument that the agency improperly interpreted the clause to require that it submit detailed literature on certain components of the system.

Responsiveness of Calma's bid

The agency found Calma's bid deficient in the following areas:

(1) Calma failed to provide descriptive literature for the "pen plotters" required in the specifications and failed to identify which of the two plotters mentioned in its bid it intended to supply.

(2) Calma failed to supply descriptive literature for the cathode-ray tube (CRT) alpha numeric terminals.

(3) Although the specifications required and Calma provided prices for schedule items 0001AG and 0001AM representing eight communication links, that firm's service agreement submitted with its bid indicated that it proposed to supply only four communication links.

(4) The specifications for the large digitizer required the unit to have a "light pen" for controlling the board work but Calma's bid offered a "constrained cursor" rather than a light pen.

The submission of descriptive data, where the data is used for bid evaluation, is a matter of responsiveness and where the data does not clearly show conformance with the specifications rejection of the bid is required. Amray, Inc., B-205037, February 9, 1982, 82-1 CPD 116. Since questions concerning the adequacy of descriptive data are essentially technical evaluations, this Office will defer to the agency's determination in the absence of evidence showing that determination to be arbitrary. See Bell & Howell Company, Datatape Division, B-204791, March 9, 1982, 82-1 CPD 219; Radix II, Inc., B-186999, February 8, 1977, 77-1 CPD 94.

Calma seems to argue that in those areas where the agency considered its bid deficient because of the protester's failure to submit literature describing a particular component--the pen plotters and the CRT alpha numeric terminals¹--the descriptive literature clause did not clearly indicate that bidders were obligated to submit data describing each component of the system. Since the descriptive literature clause stated that the literature was needed to establish that the "products" offered met the requirements of the "Interactive Graphic

¹ Calma failed to respond to that part of the agency report which stated that the protester did not submit data regarding the terminals. Consequently, it appears that the only objection the protester makes to the agency's conclusion that Calma's failure to submit such data is a basis for determining that firm's bid nonresponsive is that the descriptive data clause did not clearly require such data for the terminals.

Specification" and the requirements for both the pen plotters and the CRT alpha numeric terminals are set forth in separate sections of that specification, it should have been clear that bidders had to supply data regarding the features of these components. See Clackamas Communications, Inc., B-209387, May 23, 1983, 83-1 CPD _____. The failure to supply any such data could properly result in the agency regarding the bid as nonresponsive.

The initial reason cited by the Army for rejecting Calma's bid was that the protester failed to provide literature describing the pen plotters required under item 0001AF of the solicitation's schedule and failed to indicate which of the two pen plotters identified in its bid would be supplied. Calma contends that its response, which stated that it would comply with the specification requirements regarding the pen plotters and indicated it would offer either a Cal Comp 960 pen plotter or the Hewlett Packard 7585A pen plotter, was sufficient. The protester states that both of the specified plotters will meet all specification requirements and notes that commercial literature is readily available on both pen plotters.

The specifications at paragraph 3.3.4, required that the pen plotters (equipment capable of reproducing images produced on a design terminal or drawings stored on disks on different types of paper) be, among other things, "capable of plot speeds of at least a minimum of 40 inches/sec." Calma's bid merely indicated that it would comply with the specifications for the pen plotters. It did not show, however, that the items offered conformed to the specifications. While an offer of general compliance does not cure a failure to supply descriptive literature, Sprague & Henwood, Inc., B-201028, April 6, 1981, 81-1 CPD 260, the agency may properly refer to commercial literature publically available prior to bid opening in order to determine whether the particular component offered meets the specifications. See Lift Power Inc., B-182604, January 10, 1975, 75-1 CPD 13. The agency has reviewed such literature on the Hewlett Packard plotter and determined that its maximum plot speed is only 24 inches/sec. Since the solicitation's specifications require a speed of 40 inches/sec., it is clear that at least the Hewlett Packard plotter does not meet the agency's requirements. Where,

as here, a bidder offers to supply more than one product in response to a solicitation requirement and where at least one of those products does not meet the solicitation's specifications, the bid is at best ambiguous. By listing more than one product, Calma reserved the right to furnish either. Under these circumstances the agency could not be sure which pen plotter it was agreeing to purchase. Therefore Calma's bid does not meet the agency's requirement for these components. Hutchinson Brothers Excavating Co., Inc., B-197812, August 6, 1980, 80-2 CPD 93.

The Army also considered Calma's bid nonresponsive because it found an inconsistency in that firm's data concerning the solicitation's requirement for four communication links to the depot computer center (schedule item 0001AG) and four communication links between the graphic processors (schedule item 0001AM). The Army notes that Calma's bid included prices for both schedule items 0001AG and 0001AM but the service contract submitted with its bid had only four communication links on its equipment list. Therefore, the Army concluded, and Calma appears to concede, that it was proposing to furnish only four hardware communication links. Calma states that it satisfied the IFB's requirements by offering to furnish four hardware and four software communication links. Since specification paragraph 3.1 entitled "System Hardware" contains eight communication links on its list of required equipment, we believe that the agency has correctly determined that Calma's bid which proposed four hardware and four software communication links did not meet the solicitation's requirements.

Finally, the Army states Calma's bid was nonresponsive because Calma failed to comply with paragraph 3.3.8 of the specification for digitizers (a digitizer is a device used for graphical processing on computers which assists in translating analog information into the digital form necessary for computer processing) which provided that each unit have a "light pen" for controlling board work. Calma's literature submitted with its bid indicated that its digitizer used a constrained cursor.

Calma contends that it is not possible to use a light pen with a digitizer because a digitizer does not produce "intelligent, decodable light output that can be read by a light pen." It states that for this reason it offered its constrained cursor which will meet the Army's needs. Calma also contends that if its bid was properly rejected for failing to offer a light pen, Applicon's bid should similarly be rejected because it also did not offer a light pen but offered its "electronic pen" in response to the specification.

The Army recognizes that a light pen in the literal sense of that term is not suitable for use with a digitizer. It argues, however, that the term was used in its generic sense, (i.e., "a hand held pen-like pointing device used for graphics command/data entry and editing operations) and Calma's constrained cursor (which appears to perform these functions by manipulating keys on a keyboard) does not satisfy its requirements.

The Army concedes that the light pen requirement did not precisely reflect its needs with regard to a device for controlling the board work on the digitizer. While it argues that bidders should have inferred the intent of its specification, the agency does not explain why it was unable to accurately set forth exactly the type of device it required. We do not believe that the agency followed good procurement practices by placing the burden of interpreting these admittedly imprecise specifications on the bidders. Nevertheless, since we have concluded that the agency reasonably determined that Calma's bid was nonresponsive because that firm did not submit descriptive literature pertaining to the CRT alpha numeric terminals, its bid offered two pen plotters, one of which did not conform to the specifications, and its literature showed that it offered fewer than the required number of hardware communication links, Calma was not prejudiced by the imprecise specification for the digitizer.

Responsiveness of Applicon's bid

Calma contends that Applicon's bid is nonresponsive because it failed to include descriptive literature for the following major items:

- (1) Engineering design software. (Specification paragraph 3.2.3.)
- (2) Two and three dimensional design, engineering and architectural software. (Specification paragraph 3.2.1.b.)
- (3) Communication links. (Specification paragraph 3.3.1 and 3.3.9.)
- (4) Family of parts file (Specification paragraph 3.3.3.1.)

The agency responds that Applicon's specification 4710 and 4750 supplied with that firm's bid adequately described the software package offered by Applicon. It states that the evaluators could determine that the software would enable Applicon's equipment to perform the functions listed under specification paragraph 3.2.3.; and the tasks listed in specification paragraph 3.2.1.b regarding two and three dimensional design. The agency also states that Applicon submitted product specifications 4414, 4416, 4706, 4709 and communications/DGN with its bid which the agency considered to adequately describe the required communication links between the graphics processors and from the graphics processors to the Depot Computer Center. Finally, the agency explains that Applicon's product specification 4750 described a function of its design terminals which the evaluators considered to be a "complete and accurate description of a family of parts file."

The Army has provided our Office with Applicon's descriptive literature for each of the items Calma challenges. As indicated above, the agency states that its evaluation committee reviewed this literature and found it adequate to determine that Applicon's proposed items were fully responsive to the specification requirements. This Office will not interfere with an agency's technical evaluation regarding the adequacy of descriptive literature unless it is shown that the determination was arbitrary. Radix II, Inc., supra. We have found no basis upon which to question the agency's judgment on these matters.

Calma next contends that Applicon's bid is nonresponsive because that firm failed to include a maintenance contract as required by the solicitation. Further, the protester argues that Applicon failed to include any literature describing its policy concerning system replacement, relocation, and customer maintenance.

While the specifications state at paragraph 3.6 that the Government requires a "full service maintenance contract," there is no indication that an actual service contract must be submitted with the bid. Further in this regard, we note that the descriptive literature clause only refers to literature which establishes the details of the "products" the bidder proposed to furnish. In any event, the record contains a copy of the maintenance service agreement submitted by Applicon with its bid. This agreement specifically states that Applicon's standard form contract "is presented only as an example" which will be modified "to provide all services under 3.6 of [the] specifications." Moreover, this agreement seems to address the areas questioned by Calma, except that it does not appear to set forth Applicon's replacement policy. Since, however, the specifications do not state what an acceptable replacement policy should consist of, we do not believe that the lack of data on this matter was significant.

Calma also argues that Applicon's bid is nonresponsive because its system fails to meet the solicitation's site plan requirements and that Applicon's literature is inconsistent regarding its system's electrical power requirements. Calma states that since the solicitation requires each graphic processor to be capable of supporting four design terminals located up to 1000 feet from the processor unit, Applicon's statement in its literature to the effect that it would require 600 square feet of space for its system "leads to the conclusion that its bid is nonresponsive * * *." Calma also argues that Applicon stated in its bid that its system requires 15 amp. electrical service but Applicon's product specification 4686 indicates that some of its proposed equipment requires 30 amp. service.

Applicon's product specification 4686 submitted with its bid shows that the system operates on 15 amp. electrical service. Further, the Army states, Calma has misunderstood Applicon's statement regarding its space requirements, since the 600 square feet required for installation of Applicon's system relates to the total floor space needed for the system. The agency indicates that this 600 square feet does not necessarily have to be located in one area. Thus, the agency concludes that this does not prevent the design terminals from being located up to 1000 feet from the processing units as required by the specifications. We have no basis to object to the agency's position.

Calma next contends that Applicon's bid is nonresponsive because the literature submitted describing its model 4245 graphic processor indicates that it would support a maximum of 440,000 bytes of memory while specification paragraph 3.3.1 provides that the processor must support a minimum of 500,000 bytes of memory. The Army responds that Applicon's pre-printed descriptive literature for its graphic processor does, in fact, indicate that it has a memory capacity of only 440,000 bytes; however, this literature was amended by Applicon's response to the graphic processor specification which specifically indicates that Applicon will provide graphic processors with 500,000 bytes of memory.

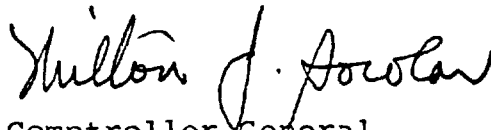
As a general rule, a bid should be rejected as nonresponsive where descriptive literature is submitted which indicates that the item offered deviates from the solicitation's specifications. Where, as here, however, a bidder submits information with its bid clarifying its pre-printed descriptive literature and obligating the bidder to contract performance as required, rejection of the bid as nonresponsive would be improper. EMI Medical, Inc., B-196470, February 21, 1980, 80-1 CPD 153. Since Applicon's response to the graphic processor specifications indicated that it intended to supply 500,000 bytes of memory, notwithstanding the statement on its pre-printed descriptive literature, we believe Applicon obligated itself to perform the contract as required.

Finally, Calma objects to the Army's acceptance of Applicon's bid which included literature indicating that it would supply an "electronic pen" with its digitizer rather than the required "light pen." As we indicated earlier, it appears that the agency's specification for this item is not as clear as it should have been. Since the agency indicates that the electronic pen offered by Applicon will meet its needs, no purpose would be served by questioning the agency's acceptance of the item offered by Applicon.

Conclusion

For the reasons stated above, we find that the Army properly rejected Calma's bid as nonresponsive. We also find that Calma's contentions regarding the responsiveness of Applicon's bid are without merit.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States